88-1538

Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

October Term, 1988

WILLIAM C. BRENNAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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150pp

QUESTIONS PRESENTED

First. (a) Where 9 counts of the indictment, charging Wire Fraud under 18 U.S.C. 1343 were dismissed in the United States District Court, Eastern District of New York, was the Petitioner entitled to similar relief as to all the other judgments of convictions, 17 in all, under the remaining counts of the indictment?

(b) Should the judgments of convictions under counts 1 and 2 based on violations of 18 U.S.C. 1962(c), (d) be vacated because 2 of the 4 racketeering acts alleged therein, contained the Wire Fraud counts that were ultimately dismissed?

Second. Is the Supreme Court of the State of New York held in and for the County of Queens an "enterprise" within the intendment of 18 U.S.C. 1961(4)?

Third. (a) Should the judgments of convitions based on 18 U.S.C. 1952(a), under counts 4-9, 17, 21 and 22 have been vacated because they were based on the identical telephone calls that were the basis of counts alleging Wire Fraud?

(b) Should the judgments of convictions based on 18 U.S.C. 1952(a), under counts 3, 10, 18, 19 and 20, involving actual travel between New York and Florida, have been vacated because of the Court's instruction to the jury?

Fourth. Should the judgment of conviction under count 26 charging attempted extortion, under 18 U.S.C. 1951(a), (b), (2), have been vacated in the event that all or some of the aforementioned convictions are vacated because of the resulting unfair prejudice?

TABLE OF CONTENTS

Page

Questions Presented i

Opinion Below 1

Statutes Involved 1

Statement of the Case 2

Reasons for Granting Certiorari 2

I—The Judgments Of Convictions Under Counts 1 and 2 Should Be Set Aside 2

II—The New York State Court Is Not An Enterprise Within 18 U.S.C. 1961(4) 8

III—The Judgments Of Convictions Under 18 U.S.C. 1952(a) Should Be Set Aside 15

IV—The Judgment Of Conviction Under Count 26 Attempted Extortion Should Be Set Aside 16

Conclusion 18

Appendix A—Court of Appeals' Order of Affirmance And Opinion 1a

Appendix B—Pertinent Statutes Involved.....27a

Appendix C—Indictment and Excerpt of Charge.....30a

CASES CITED

Pages

Amadeo v. Zant, 486 U.S. __, 100 L.E.d 2d 249, 260, 108 S.Ct. 1771 (1988).....12

Carpenter v. U.S., __ U.S. __, 108 S.Ct. 316 __, 98 L.E.D. 2d 275, 1987 2

Church of The Holy Trinity v. U.S., 143 U.S. 457, 36 __ L Ed __, 226 12 S Ct 511, (1891) 11

Garcia v. San Antonio Met Transit Auth., 469 U.S. 528 (1985).....10

McCullogh v. U.S., __ 108 S.Ct. 337, 98 L.E.D.2d 364 (1987).....5

McNally v. U.S., __ U.S. __, 107 S.Ct. 2875, 97 L.E.D.2d 292, 1987 2,16

Mills v. Maryland, 486 U.S. __, 108 S.Ct. 1860, 100 L.E.d 2d 384, 1988 5,8,16

National League of Cities v. Usery, 426 U.S. 833 (1976) 49 L.Ed.2d 245, 96 S.Ct. 2645, 88 L.Ed. 2d, 1016, 105 S.1005 10

Russell v. U.S., 369 U.S. 749 8 L.E.D. 2d 240, 82 S.Ct. 1038, (1962) 13

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 87 L.E.D. 2d 346, 105 S.Ct., 3275, (1985).....14

Strauss v. U.S., 516 F.2d 980, (Cir. 7th, 1975).....15

Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117, (1931).....3

Suffolk County, New York v. L.I. Lighting Co., D.C.N.Y. #87-Cv 646, decided 2/11/89, __ F.S. __, 57 U.S.L.W. Pg. 2476, Vol. 57 #31 11

U.S. v. Angelilli, 660 F.2d 23, (Cir. 2d, 1981).....8,9

U.S. v. Bagaric, 706 F2d 42, 55-57 14

U.S. v. Brown, 583 F2d 659, (Cir. 3d 1978).....3

U.S. v. Gorny, 674, F.S. 263, (N.D.Ill., 1987).....16

U.S. v. Ivic, 700 F.2d 51 (Cir. 2d, 1983).....9

U.S. v. Parnell, 469 U.S. 57, 23 L.Ed.2d 461, 468, 469, 105 S.Ct. 471, (1984).....15

U.S. v. Parness, 503 F2d 470, (1974).....4

U.S. v. Weisman, 624 F2d 1118, (Cir. 2d, 1980).....3,4

STATUTES CITED

28 U.S.C. 2255 1

18 U.S.C. 1961(4) 1

1962(c)(d) 1

1951(a)(b)(2) 1

1952(a), (b)(2).....1

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WILLIAM C. BRENNAN,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

The Court of Appeals' Order of Affirmance and Opinion is reported __ F.2d __ dated January 20, 1989, and both are set forth in Appendix A, *infra.*

STATUTES INVOLVED

28 U.S.C. 2255, 18 U.S.C. 1961(4), 1962(c)(d), 1951(a),(b)(2), 1952(a), (b)(2). See Appendix B, *infra.*

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*References to petitioner's appendix on appeal to the Second Circuit Court of appeals are "Ct. App. A-__."

STATEMENT OF THE CASE

The Petitioner, a former Judge of the Supreme Court of the State of New York, was indicted by a federal grand jury for 26 offenses. (App. C, *infra*).*

He duly appealed to the Court of Appeals for the Second Circuit. The judgments of convictions were affirmed. With the advent of *McNally v. U.S.*, __ U.S. __, 107 S.Ct. 2875, 97 L.E.D.2d 292, 1987 and *Carpenter v. U.S.*, __ U.S. __, 108 S.Ct. 316 __, 98 L.E.D.2d 275, 1987. He duly applied under 28 U.S.C. 2255 for collateral relief, to the United States District Court Eastern District of New York (Judge Jack Weinstein). Partial relief was afforded, but limited to the judgments of convictions under counts 11-16 and 23-25 charging Wire Fraud. The reason for this was that the "fraud" involved "intangible rights." This left for collateral review the resulting unfair prejudice as to all the other counts and the ensuing convictions thereunder.

Therefore, in this Section 2255 proceeding there are no questions of fact to be reviewed. All the arguments herein were initially presented in the two preceding stages of this application.

REASONS FOR GRANTING CERTIORARI

I

THE JUDGMENTS OF CONVICTIONS UNDER COUNTS 1 AND 2 SHOULD BE SET ASIDE:

Counts 1 and 2 of the indictment were founded on 18 U.S.C. 1962(c), (d). Count 1 alleged four racketeering acts. Count 2 charging a conspiracy expressly reincor-

porated count 1 in its entirety. Racketeering acts 3, 4 expressly alleged each and every one of the substantive counts. Among these counts racketeering acts 3 and 4 both respectively contained counts 11-16 and 23-25 founded on Wire Fraud. The jury was specifically instructed in part as follows:

> ". . . , in order to establish a pattern of racketeering activity the Government must prove beyond a reasonable doubt that the defendant committed *at least one* of the offenses charged under any two of the predicate acts alleged. This means that you need only find the defendant guilty of one count under the third or fourth predicate acts, which charge multiple violations, for that predicate to form part of the pattern . . ." (App. A55-A56).

There being a general verdict, it is unknown whether the trial jury actually reached racketeering acts 3 and 4. However, if it did so it will never be known whether as to each respective act the jury decided as to the Wire Fraud counts or not; see *Stromberg v. California,* 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117, (1931). Both the Disrict Court and the Circuit Court relied on *U.S. v. Weisman,* 624 F2d 1118, (Cir. 2d, 1980). In that case, two conspiracies to commit bankruptcy and securities fraud were alleged as racketeering acts. The appellants' claim was that those conspiracies could not be racketeering acts because they did not come under the statutory requirements as to the pattern, under 18 U.S.C. 1961 and 1962 and that they were not designated offenses so as to constitute the predicate under 18 U.S.C. 1961(1). On appeal it was held that those conspiracies were within the definition of "pattern" and that since the jury convicted the appellants under the separately charged conspiracies, it was not "unreasonable" for the jury to convict the appellants under the racketeering count. That opinion went on to distinguish *U.S. v. Brown,* 583 F2d 659, (Cir. 3d 1978).

Weisman also relied on another Second Circuit holding in *U.S. v. Parness,* 503 F2d 470, (1974). In *Parness,* the appellants were convicted of violating 18 U.S.C. 1962(b), namely acquiring an "enterprise" through a pattern of racketeering. The pattern consisted of three substantive counts, separately charged. At trial, certain substantive counts were dismissed and never reached the jury. The jury convicted the appellants of the remaining substantive counts. In one sentence at pg. 438 the Second Circuit stated in part that:

> ". . . such convictions provide sufficient predicates for his conviction under 1962(b)."

The holding in *Parness* cited no authority for that conclusion; neither precedent nor reference to the legislative hearings underlying the anti-racketeering statutes. The jury in *Parness* did not have to consider the counts of the indictment that were dismissed by the trial Court. In this case, the jury had to consider among all the other charges the Wire Fraud counts.

In *Weisman, supra,* the specific holding was because the appellants' arguments as to the propriety of charging two conspiracies in regard to the pattern instruction, were not credited by the Second Circuit. Therefore, the further holding by the Second Circuit was not necessary for the decision.

In this case, because the trial jury had before it the 9 involved Wire Fraud counts and the Court's instruction that the jury need consider only 1 count included in each respective racketeering act, there is a matter of pure speculation as to whether the jury considered the absorbed counts other than the Wire Fraud charges. The reasoning of *Weisman* resounds in the doctrine of collateral estop-

pel. It seems to be that if a jury convicts under a substantive count, the jury must have necessarily been satisfied that the pattern under the anti-racketeering statute was also established. Furthermore, the Court's position was that the jury was instruced that it must decide each count separately. It is reiterated that because there was a general verdict in this case, it is not known whether the trial jury considered racketeering acts 3 and 4, and if so, which specific element of each count.

Brought to the attention of both Courts below, petitioner's counsel cited *McCullogh v. U.S.*, __ 108 S.Ct. 337, 98 L.E.D.2d 364 (1987). That was a denial of certiorari. Two judges of this Court dissented pointing out the conflict of Circuit holdings on this issue.

This brings us to *Mills v. Maryland,* 486 U.S. __, 108 S.Ct. 1860, 100 L.E.d 2d 384, 1988 (Chief Judge Rehnquist with Justices O'Connor, Scalia, and Kennedy dissenting).

This was a death penalty case. A then existing written verdict form with special findings was handed to the jury as to the issue of mitigation of the death penalty. In addition, the jury was orally instructed repeatedly, as to this phase. The court's instruction form was questioned by the defense because it was ambiguous as to the requirement of unanimity as to a step in the evaluation of mitigation. The precise issue before this Court was that there was a grave likelihood that the jury was not required to be unanimous in regard to a consideration of the mitigating factor. The Court's oral charge did require unanimity. It was argued that a "rational" jury could have arrived at the adverse verdict. On pages 394-395 of 100 L.Ed.2d it was stated in part that:

> "The critical question, then, is whether petitioner's interpretation of the sentencing process is one a reasonable jury could have drawn from the instructions given by the trial judge and from the verdict form employed in this case. . . . (The question . . . is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning), . . . If the jury understood the verdict form as the Court of Appeals asserted it should have, then every time it marked "no" beside a mitigating circumstance it indicated its unanimous conclusion that petitioner had not proved the relevant facts by a preponderance of the evidence, and thus the court properly upheld the judgment. On the other hand, if the jury understood that it should mark "no" when it failed to agree unanimously that a mitigating circumstance existed, then some jurors were prevented from considering "factors which may call for a less severe penalty," . . . and petitioner's sentence cannot stand."
>
> "With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. . . ."

(omitting internal citations)

This was the argument of petitioner to both Courts below.

It is submitted that the majority holding in that case disposes of the issue favorably to petitioner.

It is repeated that due to the Court's charge it is not, nor will it ever be known, what the trial jury considered in

regard to racketeering acts 3 and 4. Racketeering act 3 contained 14 substantive counts of the indictment; racketeering act 4 contained 9 counts of the indictment including Wire Fraud. Since the jury was required to only determine one of those elements of each respective racketeering act, it only invites speculation to conclude that the non-Wire Fraud counts were considered rather than the Wire Fraud counts (App. B, A5-A13).

The fact that one act can violate two separate penal statutes and one statute is later declared inapplicable does not inform us what the jury had in its collective mind.

It is not contested that the telephone calls involved in this case were deemed to be violative of the travel act Sec. 1952A and Wire Fraud Sec. 1343. The Court in regard to the travel act also instructed the jury disjunctively in regard to telephone calls and travel between the states. The actual charge in this respect is set forth verbatim:

> "Second, that the interstate travel *or* telephone call was conducted with the specific intent to further the unlawful activity charged in the indictment, namely bribery;"
>
> "Third, that, following the interstate travel or telephone call, the defendant knowingly and wilfully furthered or attempted to further the unlawful activity or bribery in some manner."
>
> "The first element of a Travel Act violation that the Government must establish is the interstate travel *or* use of the telephone for an interstate call as alleged in the indictment. By interstate travel *or* telephone call, I mean travel or a telephone call from one state to another—in this case, from New York to Florida or vice-versa." (emphasis supplied) (App. C, A.33, A.34)

It is submitted that this disjunctive charge further complicated the issue as to which component of racketeering acts 3 and 4 the jury rendered its verdict on. As will be argued below, this charge gave the jury under the travel act the option of disjunctively deciding that if a telephone call was made in connection with bribery, both elements of the travel act were satisfied. On the other hand, the jury could have decided that if there was actual travel in commerce both components of the travel act were satisfied. It would only be wasteful speculation to proceed further in evaluating the jury's determination in this regard. See, *Mills v. Maryland, supra.*

Racketeering acts 1 and 2 charged bribe receiving under New York State law. Bribe receiving was alleged in the Wire Fraud counts. Consequently, the "intangible rights" theory involved bribe receiving. The petitioner's parallel argument therefore is that it is unknown whether the jury considered all 4 racketeering acts, or merely racketeering acts 1 and 2, which were not charged as substantive counts. If such is the case, the Carpenter holding affected the jury's verdict.

II

THE NEW YORK STATE COURT IS NOT AN ENTERPRISE WITHIN 18 U.S.C. 1961(4):

a

Initially, it was pointed out by petitioner's counsel that the Supreme Court or even any State agency or subdivision was not an "enterprise." Counsel conceded that and initially referred to *U.S. v. Angelilli,* 660 F.2d 23, (Cir. 2d, 1981) Judge Friendly dissenting. This argument was based on the

fact that there was tension between Angelilli and *U.S. v. Ivic,* 700 F.2d 51 (Cir. 2d, 1983). In *Angelilli,* Judge Friendly's dissent referred to the legislative history as well as, the anti-racketeering statutes. He also relied on the dictionary for the definition of "enterprise." It was also noted in that dissent that Congress desired that these statutes be construed generously.

Two years after *Angelilli* was decided *U.S. v. Ivic, supra,* was decided. A unanimous panel held that Croatian terrorists engaged in a course of violence. Judge Friendly held that the conspiracy under Sec. 1962(d) of the anti-racketeering statute did not embrace the "entity" in that case, because the entity was not economically motivated and was not formed for that purpose. However, Judge Friendly based his holding on his dissent in *Angelilli.* The panel that decided *Ivic* was unanimous.

Federal jurisdiction over States and their agencies is embraced in Article 1, Section 3 of the Federal Constitution namely, the "commerce clause." The exercise of Federal commerce power has clashed with the Tenth Amendment to the Federal Constitution which reserved to the States their inherent sovereign powers.

The petitioner is not presenting an issue as to whether Congress may or may not legislate in a manner to affect a State judiciary or any State agency. Rather, there is a substantial issue, whether the Congressional hearings and comments underlying the anti-racketeering statutes were the proper basis for the overwhelming number of holdings contrary to the petitioner's argument. See for instance, Tarlow

"Rico The New Darling of the Prosecutor's Nursery," 49 Fordham Law Review, 166 (1980, at pgs. 205-209, where this issue is explored.

On pg. 207, it is stated in part:

> ". . . the government cannot obtain any significant advantage by alleging a government enterprise rather than an illegal enterprise. Indictment of legitimate entities normally benefits the government by triggering the operation of various remedies that affect the organization alleged as the enterprise. Use of the government enterprise theory does not offer this advantage because section 1964(a) civil remedies and section 1963 forfeitures are inappropriate when applied to government organizations. If applied to a state government office, these remedies would raise serious constitutional questions concerning Congress' authority under the commerce clause 'to structure the integral operations . . . of traditional (state) governemntal functions.' (omitting footnotes).

The explanation contained in Sec. 1961(4) of 18 U.S.C. is no definition. It merely gives examples of "enterprise." It does not tell us what an "enterprise" is. In effect, it states that a "enterprise" can include almost everything. This is not very illustrating. Thus, "commerce among the states" is an evolving concept. The Supreme Court of the United States in a span of 9 years radically changed its position in regard to the reserved powers of the States and the commerce clause. See, *National League of Cities v. Usery,* 426 U.S. 833 (1976) 49 L.Ed.2d 245, 96 S.Ct. 2645, 88 L.Ed. 2d, 1016, 105 S.1005 and *Garcia v. San Antonio Met Transit Auth.,* 469 U.S. 528 (1985). The latter holding was to the effect that a State government function was not immunized from the reach of the commerce clause and held that Federal economic regulation overrode the Tenth Amendment, at pgs. 341, 345-347.

In 33 Vanderbilt Law Review, at pgs. 469 et seq., it was specifically stated at pg. 474 that:

> ". . . Since 2097 pages of hearings, two Congressional reports, and the operative provisions of Title IX make no explicit references to governmental bodies as enterprise, the most rationale explanation is that Congress did not intend to include government organizations as RICO enterprises . . ."

In *Church of The Holy Trinity v. U.S.,* 143 U.S. 457, 36 __ L Ed __, 226 12 S Ct 511, (1891) on pg. 459, this Court held that even if a statute is properly interpreted within the wording of the statute, it would be rejected if it lead to a result inconsistent with the legislative intent.

It is not conceded that Sec. 1961(4) is clear. It is over inclusive and glosses over the fundamental functions of the judiciary and the legislature. It delegates to the executive branch to serve the prosecutor's imagination and overrides the sensitive relations between the States and the Federal government.

In *Suffolk County, New York v. L.I. Lighting Co.,* D.C.N.Y. #87-Cv 646, decided 2/11/89, __ F.S. __, 57 U.S.L.W. Pg. 2476, Vol. 57 #31, it was held in that civil case based on the anti-racketeering statutes, that those statutes did not cover the theory of the plaintiff's complaint. The Court, in evaluating the circumstances in that case, specifically noted the lack of congressional hearings or precedents. The Court pointed out that the issues constituting mail fraud as a racketeering act was of the State concern in regard to State regulation of public utilities and that there was no congressional authority or purpose underlying the anti-racketeering statuts and, therefore, these statutes did not extend to the States in this regard. So

also in this case. New York has statutes dealing with State corruption. The Federal government has other statutes dealing with bribery within the States. See, 18 U.S.C. 1952(b).

b

On pgs. 13-16 of the Court's opinion it was clearly held that this issue would not be entertained because of a failure of prior counsel to raise this issue either at the trial level or on the direct appeal to the Court below. The Court below rested on the holdings of this Court as to "cause and prejudice."

As was recently said in *Amadeo v. Zant*, 486 U.S. ___, 100 L.E.d 2d 249, 260, 108 S.C.. 1771 (1988) the expression "cause and prejudice" is not precisely defined. The Court below also recognized this.

It is submitted that there was no waiver of this argument by the petitioner. Firstly, his prior attorneys did not raise this. The petitioner did not waive it but has been estopped because of the attorneys' "omission."

The Court below indicated that there would be a due process argument if the law was changed. That is if cases favorable to petitioner's argument were decided later.

Petitioner raised the argument that this is "jurisdictional." The indictment stating in "the introduction" to the charges of the indictment alleged that the Supreme Court was the "enterprise" within the meaning of Sec. 1961(4). Present counsel argued that Congress never intended "enterprise" to embrace the States judiciary. The Court below stated that this was merely an interpretation

of a statute and did not reach the jurisdiction of the District Court.

Petitioner of course had to "interpret" the statute to ascertain whether the statute involved the subject matter herein argued. All that is necessary to decide this issue is the indictment itself.

The jurisdiction of the District Court in regard to prosecution of crimes is founded on the Fifth Amendment of the Federal Constitution. The prosecution for felonies is founded on a valid grand jury indictment. Rule 7(c)1 of the F.R.C.P. mandates that "an indictment be a 'statement' of the essential facts constituting the offense charged . . ." It is submitted that the "offense" charged in Counts 1 and 2 is in reality no offense and that the Court simply did not have jurisdiction. While this matter involves statutory interpretation, the statute had to be "interpreted" so to determine the jurisdictional issue.

No factual evaluation of the grounds of this argument required a trial of factual issues. Rule 12(b)(2) FRCP clearly states that a defense position that indicates a jurisdictional issue or an omission to charge an offense can be noticed at any time. It would seem therefore that this argument transcends the "cause and prejudice" test. The trial Court in its opinion merely stated that the Supreme Court of the State of New York was an "enterprise."

As this Court stated in *Russell v. U.S.*, 369 U.S. 749 8 L.E.D. 2d 240, 82 S.Ct. 1038, (1962) at pg. 770, "an insufficient indictment cannot be cured by a bill of particulars."

The Court below cited *U.S. v. Bagaric*, 706 F2d 42, 55-57 on pg. 23 of its opinion. In *Bagaric*, the Court distinguished the unanimous holding in *Ivic* because while the defense was that the "nationalists" were not a "enterprise" the racketeering acts involved illicit economic gain. The Second Circuit held in *Bagaric* that either the "enterprise" or the crimes involved in the racketeering acts must involve economic gain. What this means is that any "enterprise" is subject to the broad reach of the anti-racketeering statutes so long as the predicate crimes underlying the racketeering acts involve economic gain.

It is respectfully submitted that this appears to conflict with the holding in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 87 L.E.D. 2d 346, 105 S.Ct., 3275, (1985). On pg. 496 of 474 U.S., that the constituent elements of Sec. 1962(c) requires an "enterprise" conducted through a pattern of racketeering activity. It follows that racketeering activity is distinct from the meaning of "enterprise." If petitioner is correct, if the "enterprise" in this case is simply not within the particular legislation, the fact that "pattern" involves pecuniary gain does not give meaning to the expression "enterprise."

28 U.S.C. 2255 in its broad remedial language refers to sentencing an accused where the Court is without "jurisdiction" or where an accused has been denied of a constitutional right, relief may be obtained.

III

THE JUDGMENTS OF CONVICTIONS UNDER 18 U.S.C. 1952(a) SHOULD BE SET ASIDE:

a

Counts 4-9, 17, 21 and 22 were incorporated in racketeering acts 3 and 4. They were founded on the same telephone calls that were the basis of the Wire Fraud counts. Since there was a general verdict and since the jury was instructed that the Wire Fraud involved "intangible rights," the jury's verdict was "enmeshed" with the stricken counts, see *Strauss v. U.S.*, 516 F.2d 980, (Cir. 7th, 1975). The jury was also instructed that these calls were embraced in the travel act Sec. 1952. It is true that the Court instructed the jury that each count had to be evaluated separately, however, it has been recognized that juries often do not or cannot follow instructions, see *Cruz v. U.S.* Furthermore, juries for some unarticulated subjectivenism often render inconsistent verdicts, see *U.S. v. Parnell*, 469 U.S. 57, 23 L.Ed.2d 461, 468, 469, 105 S.Ct. 471, (1984).

b

Counts 3, 10, 18, 19 and 20 were also based on the travel act Sec. 1952 and were based on actual passage between Florida and New York.

As has been brought to the attention of this Court in instructing the jury as to these counts, the Court stated "interstate travel or telephone call" to further bribery;

Then the Court charged the jury that to establish a violation the Government had to prove the interstate

travel or use of the telephone for an interstate call, as alleged in the indictment. The Court further told the jury that the travel or the calls had to be between the States, (Ct. App. A33, A34).

Since the verdict was a general one, it is not known which element of the travel act the jury based its verdict. It could have been both elements, it could have been the travel alone or it could have been the telephone calls. If it were the telephone calls, it is put that "the intangible rights theory" was so intermingled with the telephone calls under the travel act, that they permeated the jury's verdict under Sec. 1952. See, *Mills v. Maryland, supra.*

IV

THE JUDGMENT OF CONVICTION UNDER COUNT 26 ATTEMPTED EXTORTION SHOULD BE SET ASIDE:

Count 26 of the indictment was based on Sec. 1951(a). Sec. 1951(a) was embraced in Count 26. This was an attempt to impede commerce by extortion in regard to a bribe. In regard to this count, as well as, to the other counts, this Court is referred to *U.S. v Gorny,* 674, F.S. 263, (N.D.Ill., 1987), where the indictment charged 10 counts of mail fraud and numerous counts of obstructing criminal investigation. The other counts were based on Sec. 1341 and 1962(c). Because of the ruling in *McNally,* this case came about on a post-conviction, collateral application. The case mainly dealt with the disturbance of all the convictions based on the racketeering statute and the statute dealing with impeding a criminal investigation.

Complete relief was granted. On pg. 266 it was stated in part that:

"It is true that the jury could have rested its verdict on the racketeering count solely on the evidence concerning the alleged briberies; but we do not know if it did this. There is a reasonable possibility that the jury relied, in whole or in some part, on the evidence that the government offered to support the mail fraud counts, even though, as it is now known, defendant had not committed mail fraud . . ." (Omitting internal quotations and citations).

In regard to the conviction of obstructing a criminal investigation, it was stated in part on pgs. 266-267, that:

". . . To what extent the verdict was influenced by the inadmissible and prejudicial evidence cannot be determined since the jury's verdict was a general one. For this reason, as in the case of the racketeering count, the verdict must be set aside . . . And in this coram nobis motion, defendant's conviction for obstruction of a criminal investigation must be vacated . . ." (Omitting internal quotations and citations).

". . . The racketeering count will have to be altered by deleting all allegations concerning multiple acts of mail fraud; and the obstruction count would have to be altered to delete all references to the fact that the official investigation was into possible violations of Title 18 U.S.C. 1341, the mail fraud statute. These alterations, of course, would deprive defendant of the defense that the government could not prove the charges that the grand jury included in those two counts of the indictment. Those alterations would have materially amended the indictment. However, only the grand jury, not the court, can materially amend a criminal indictment . . ." (Omitting internal quotations and citations).

In regard to count 26 which charged attempted extortion, it is apparent that the alleged victim was not put in fear or was not intimidated, because he was cooperating

with the authorities; however, from an evidentiary point of view, the factual element of this count involved a solicitation of a bribe. The bribe was the basis for all the other counts in the indictment including Wire-Fraud. Since the appellant's contention is that due to the charge in the 9 Wire-Fraud counts, and the Court's instructions to the jury in regard to the travel act with the disjunctive phrasing, this rendered that count tainted.

In sum, this case cannot be limited to a mere redaction of the Wire Fraud Counts, and thereby allow the other judgments of convictions to stand. The petitioner, by virtue of the "intangible rights theory" was denied a fundamentally fair trial, depriving him of due process of law.

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari be issued so that the judgment below may be reviewed.

Dated: March 14, 1989

Respectfully submitted,

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APPENDIX A—COURT OF APPEALS' ORDER OF AFFIRMANCE AND OPINION

United States Court of Appeals
for the
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of January one thousand nine hundred and eighty-nine.

Present: Hon. THOMAS J. MESKILL,
Hon. LAWRENCE W. PIERCE,
Hon. RALPH K. WINTER,
Circuit Judges,

WILLIAM C. BRENNAN,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Docket No. 88-2253

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgment

of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

Elaine B. Goldsmith,
Clerk
s/ Edward J. Guardaro
by: Edward J. Guardaro,
Deputy Clerk

ISSUED AS MANDATE:
Feb. 24, 1989

United States Court of Appeals
Second Circuit
United States Courthouse
Foley Square
New York 10007
(212) 791-0103

ELAINE B. GOLDSMITH
Clerk

January 20, 1989

RE: Brennan v. USA
Docket No.: 88-2253

Gentlemen:

The court has rendered a decision in the above-entitled case. The decision of the district court has been *AFFIRMED*

A copy of the opinion will be mailed to you. Additional copies of the opinin may be obtained from this office in accordance with §0.17(7) of the rules of this court supplementing the Federal Rules of Appellate Procedure.

Judgment has been entered today and a mandate will issue only to the District Court in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

Your attention is directed to the provision of Rule 39 of the Federal Rules of Appellate Procedure requiring the itemized and verified bill of costs, if any, to be filed with proof of service, within 14 days after entry of judgment.

Very truly yours,

ELAINE B. GOLDSMITH, Clerk
by ROBERT RODRIGUEZ,
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 134 August Term, 1988
(Argued September 20, 1988 Decided Jan. 20, 1989)
Docket No. 88-2253

WILLIAM C. BRENNAN,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Before: MESKILL, PIERCE and WINTER, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Eastern District of New York, Weinstein, *J.*, granting in part and denying in part appellant William C. Brennan's petition for relief under 28 U.S.C. §2255.

Affirmed.

ARNOLD E. WALLACH, New York City (Harold Borg, Kew Gardens, New York, of counsel), *for Appellant.*

BERYL A. HOWELL, Assistant United States Attorney, Eastern District of New York, Brooklyn, New York (Andrew J. Maloney, United States Attorney for the Eastern District of New York, John Gleeson, Assistant United States Attorney, Eastern District of New York, Brooklyn, New York, of counsel), *for Appellee.*

MESKILL, **Circuit Judge:**

William C. Brennan sought relief under 28 U.S.C. § 2255 (1982), arguing that the Supreme Court's decision in *McNally v. United States, __U.S.__, 107 S.Ct. 2875 (1987), required the vacatur of his nine wire fraud convictions and also his seventeen other convictions. The United States District Court for the Eastern District of New York, Weinstein, J.*, granted in part and denied in part the motion, vacating only the wire fraud convictions. *United States v. Brennan,* 685 F.Supp. 883 (E.D.N.Y. 1988). Brennan appeals from so much of the judgment as denied his request for relief. We affirm the judgment of the district court.

BACKGROUND

William C. brennan, a former Justice of the Supreme Court of the State of New York in Queens County, was convicted, after a jury trial, of twenty-six felonies involving use of his judicial office for the solicitation and acceptance of bribes. Specifically, Brennan was convicted of one substantive count under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. %% 2, 1962(c) (1982), one countg of conspiracy under RICO, 18 U.S.C. %1962(d), nine counts of fraud by wire, 18 U.S.C. %% 2, 1343 (1982) (wire fraud), fourteen counts of interstate travel in aid of racketeering enterprises, 18 U.S.C. %% 2, 1952(a) (1982) (Travel Act), and one count of interference with commerce by threats or violence, 18 U.S.C. %% 2, 1951(a) (1982) (extortion). The facts leading up to these convictions are set out in our earlier opinion, *United States v. Brennan,* 798 F.2d 581 (2d Cir.1986), but we reexamine here the specific details of the convictions challenged on this appeal.

The government offered evidence to show that, between 1972 and 1985, Brennan agreed to fix seven cases in exchange for bribes. The charges of the indictment, however, were limited to Brennan's corrupt handling of four of these cases, the *Messina, Botta, Romano* and *Polisi* cases. The two RICO counts focused on Brennan's activities in connection with all four of these cases.

Brennan's nine wire fraud and fourteen Travel Act convictions were based only on acts done in connection with the fixing of the *Romano* and *Polisi* cases. Under these two statutes, numerous interstate telephone calls and trips made in connection within the *Romano* and *Polisi* bribery schemes each constituted separate felonies. Phone calls made between Queens or Floral Park, New York and Hallandale, Fort Lauderdale or Miami, Florida by Brennan or his middleman Anthony Bruno formed the bases of Brennan's convictions for both wire fraud and Travel Act crimes. Specifically, the following table shows the fourteen acts that led to Brennan's fourteen Travel Act convictions and nine wire fraud convictions.

ROMANO CASE

Date	*Act*	*Conviction By Count And Statute*
11/28/80	Travel from Fort Lauderdale to Queens	Count 3 Travel Act
12/7/80	Telephone call from Hallandale to Queens	Count 4 Travel Act and Count 11 Wire Fraud
12/7/80	Telephone call from Queens to Hallandale	Count 5 Travel Act and Count 12 Wire Fraud
12/7/80	Telephone call from Hallandale to Floral Park	Count 6 Travel Act and Count 13 Wire Fraud

12/9/80	Telephone call from Hallandale to Queens	Count 7 Travel Act and Count 14 Wire Fraud
12/9/80	Telephone call from Hallandale to Floral Park	Count 8 Travel Act and Count 15 Wire Fraud
12/10/80	Telephone call from Hallandale to Queens	Count 9 Travel Act and Count 16 Wire Fraud
1/5/81	Travel from Fort Lauderdale to Queens	Count 10 Travel Act

POLISI CASE

2/1/85	Telephone call from Queens to Hallandale	Count 17 Travel Act and Count 23 Wire Fraud
2/2/85	Travel from Queens to Miami	Count 18 Travel Act
2/13/85	Travel from Queens to Fort Lauderdale	Count 19 Travel Act
2/17/85	Travel from Miami to Queens	Count 20 Travel Act
2/20/85	Telephone call from Queens to Hallandale	Count 21 Travel Act and Count 24 Wire Fraud
2/22/85	Telephone call from Queens to Hallandale	Count 22 Travel Act and Count 25 Wire Fraud

App. at 37-38, 42. Additionally, Brennan's activities in connection with the *Polisi* case led to his single extortion conviction. App. at 43.

With respect to Count One, the substantive RICO count, the jury was properly instructed that in order to convict Brennan, they would have to find, *inter alia,* that he had committed at least two predicate acts. App. at 55; *see* 18 U.S.C. §§ 1961(5), 1962(c).

The jury had before it a pool of possible predicate acts comprised of twenty-eight alleged violations of state and federal law committed by Brennan. These possible predicate acts included the above-detailed federal wire fraud, Travel Act and extortion offenses that were separately charged under Counts 3-26 of the indictment, together with four alleged instances of Bribe Receiving, in violation of New York state law, N.Y. Penal Law § 200.10 (McKinney 1988), in connection with the *Messina, Botta, Romano* and *Polisi* cases. These twenty-eight acts were divided into four categories corresponding to the four cases the indictment changed Brennan with having fixed. Thus, the pool of acts that could have supported a substantive RICO conviction were:

1. Bribe Receiving in connection with the *Messina* case;

2. Bribe Receiving in connection with the *Botta* case;

3. In connection with the *Romano* case:
   a. Bribe Receiving;
   b. Violation of the Travel Act (also alleged as separate crimes under Counts 3-10);
   c. Wire Fraud (also alleged as separate crimes under Counts 11-16); and

4. In connection with the *Polisi* case:
   a. Bribe Receiving;
   b. Violation of the Travel Act (also alleged as separate crimes under Counts 17-22);
   c. Wire Fraud (also alleged as separate crimes under Counts 23-25);
   d. Extortion (also alleged as a separate crime under Count 26).

App. at 55.

The jury was instructed that in order to convict Brennan under the substantive RICO count, they would have to find, *inter alia,* that he had committed at least one of these offenses in the context of at least two separate cases. Thus, using the examples given to the jury by Judge Weinstein, App. at 55-56, finding one *Messina* predicate act (i.e., Bribe Receiving) and any one *Romano* predicate act (e.g., wire fraud) would be sufficient, as would a finding that Brennan committed Bribe Receiving in both the *Romano* and *Polisi* cases. It would not be enough, however, to find only the commission of two *Polisi* predicate acts (e.g., Bribe Receiving and Travel Act).

Following Brennan's conviction, by a general verdict, on all twenty-six counts, Judge Weinstein imposed a sentence of concurrent terms of imprisonment of five years each on the substantive RICO count, the RICO conspiracy count and the extortion count. A consecutive term of five years on the remaining twenty-three counts was suspended, and Brennan was put on probation for an additional five years, subject to the condition that he have nothing further to do with the law, law enforcement or the public trust. Brennan was assessed a fine of $209,000, a RICO forfeiture of $14,000 and a mandatory special assessment of $1,300. *United States v. Brennan,* 629 F.Supp. 283, 306-07 (E.D.N.Y. 1986).

Brennan appealed his conviction solely on evidentiary grounds, and we affirmed. *Brennan,* 798 F.2d 581.

Following the Supreme Court's decision in *McNally v. United States,* __U.S.__, 107 S.Ct. 2875 (1987), Brennan filed a petition pursuant to 28 U.S.C. § 2255 seeking the vacatur of all twenty-six of his convictions. Because the jury instructions had permitted the jury to base Brennan's wire fraud convictions on the "intangible rights"

theory rejected in *McNally,* Brennan argued that his wire fraud convictions were invalid. After our decision in *Ingber v. Enzor,* 841 F.2d 450 (2d Cir. 1988), the government conceded that *McNally* rendered Brennan's wire fraud convictions invalid, and the district court vacated the nine wire fraud convictions. The district court refused, however, to vacate Brennan's seventeen other convictions. Brennan was resentenced, with the only change in his sentence being a reduction of his fine by $9,000 to $200,000 and of his special assessment by $450 to $850. 685 F.Supp. at 887.

Brennan appeals the district court's decision not to vacate the seventeen non-wire fraud convictions. He argues that his two RICO convictions must be vacated because (1) they may have been based on the invalid wire fraud counts, (2) they are invalid under the applicable five year statute of limitations, and (3) they are invalid because the Supreme Court of New York is not an "enterprise" under the RICO statute. Brennan also argues that his Travel Act and extortion convictions must be vacated. We reject Brennan's arguments and affirm the decision of the district court.

DISCUSSION

A. The RICO Convictions

1. Effect of Vacating the Wire Fraud Convictions

On this appeal Brennan claims that the jury instructions made it possible for the jury to base his RICO convictions on the finding that he committed wire fraud in connection with the *Romano* and Polish cases. From this undisputed fact, Brennan draws the much disputed conclusion that his conviction under Count One of the indict-

ment, the substantive RICO count, must be vacated because, in the face of a general verdict, we cannot now know whether that conviction is based on the subsequently invalidated wire fraud counts.

Had the invalid wire fraud counts been the only predicate acts supporting the RICO conviction, that conviction would be subject to invalidation on the ground that it rested on predicate acts that can no longer be considered unlawful in the wake of *McNally*. Indeed, vacating the RICO conviction might be required if there were even a possibility that it was supported only by the wire fraud counts, "absent some indication by the jury that its determination of guilt rested on two or more predicate acts that are legally sufficient." *See United States v. Ruggiero,* 726F.2d 913, 921 (2d Cir.), *cert. denied,* 469 U.S. 831 (1984). But there is no such possibility here. It is clear that the RICO conviction is amply supported by the jury's finding numerous other "legally sufficient" predicate acts and that the wire fraud counts could not rationally have been essential to the RICO conviction.

Brennan's argument is flawed. The fourteen Travel Act offenses committed were not only possible predicate acts under Count One; they were also separately charged crimes, for all of which Brennan was convicted by this jury. Thus, we are not left to mere speculation as to the grounds for the substantive RICO conviction, as were the courts in *United States v. Brown,* 583 F.2d 659, 669 (3d Cir. 1978), *cert. denied,* 440 U.S. 909 (1979), and *United States v. Holzer,* 840 F.2d 1343, 1352 (7th Cir.), *cert. denied,* 108 S.Ct. 2022 (1988), the cases upon which Brennan relies. Here, the separate Travel Act counts "operated like special verdicts; by finding guilt on [all] those counts the jury also found that [*Romano* and *Polisi* predicate acts] had been shown." *See United States v. Pepe,* 747

F.2d 632, 668 (11th Cir. 1984). The fourteen Travel Act convictions show that the jury found that Brennan had committed at least eight predicate acts in connection with the *Romano* case and six predicate acts in connection with the *Polisi* cases.

Under our decision in *United States v. Weisman,* 624 F.2d 1118, 1124 (2d Cir.), *cert. denied,* 449 U.S. 871 (1980), the Travel Act convictions are sufficient to sustain the Count One RICO conviction as long as we find, as a matter of law, that "the jury also found that these [Travel Act] substantive offenses occurred in the conduct of an 'enterprise' engaged in interstate or foreign commerce, as required by section 1962(c)." *See also United States v. Lozez,* 803 F.2d 969, 976-77 (9th Cir. 1986), *cert. denied,* 107 S.Ct. 1958 (1987). Under *Weisman,* the inquiry we must make is whether the jury rationally could have concluded that Brennan's wire fraud acts were committed in the conduct of the enterprise's affairs and at the same time found that his Travel Act offenses were not. If such a finding by the jury would have been irrational, then "even if the [wire fraud] counts were excluded, the jury verdict conclusively established a RICO violation and therefore any error in the inclusion of these counts in the RICO charge was harmless." *See Weisman,* 624 F.2d at 1124; *see also United States v. Parness,* 503 F.2d 430, 438 (2d Cir *cert. denied,* 419 U.S. 1105 (1975).

We agree with the district court that it is even more obvious here than in *Weisman* that the jury's verdict supports the RICO conviction. The jury could not rationally have found that the wire fraud offenses but not the Travel Act offenses occurred in the conduct of the enterprise, the Supreme Court of New York. The very same telephone calls that formed the basis of *every* separate wire fraud count also formed the basis of a Travel Act count. As

shown above, the acts underlying wire fraud Counts 11, 12, 13, 14, 15, 16, 23, 24 and 25 correspond exactly to Travel Act Counts 4, 5, 6, 7, 8, 9, 17, 21 and 22, respectively. If, as Brennan asserts, the jury based the RICO conviction on a particular wire fraud predicate act, *e.g.*, the Count Eleven December 7, 1980 telephone call made in connection with the *Romano* case, then the jury necessarily found that that particular phone call was made "in conduct of the enterprise." But in so finding, the jury necessarily found that Count Four, which also served as a *Romano* predicate act and for which Brennan was also convicted, was also committed "in conduct of the enterprise," because it was the very same call. The same analysis applies to every possible *Romano* and *Polisi* predicate act based on wire fraud. Thus, under *Weisman* and in light of the separate Travel Act convictions, Brennan's Count One conviction cannot rationally be based only on any wire fraud predicate act, because the finding of any wire fraud predicate act necessarily reqired a finding of a corresponding Travel Act predicate act.

Faced with the clear application of *Weisman,* Brennan argues that our decision in *Weisman* is in conflict with the decisions of other circuits. Brennan relies on *McCulloch v. United States, __U.S.__, 108 S.Ct. 337 (1987) (White, J.*, disenting from denial of certiorari), where Justice White referred to "the disagreement and uncertainty among the Courts of Appeals" with respect to the "question of whether a RICO conviction may stand with some -- but not all -- of a defendant's convictions for the predicate acts which are the basis of his RICO conviction are vacated."

The applicable decisions of other circuits actually support upholding Brennan's conviction here. *See, e.g., United States v. Anderson,* 809 F.2d 1281, 1284-85 (7th

Cir. 1987); *Lopez,* 803 F.2d at 976-77; *Pepe,* 747 F.2d at 667-68; *United States v. Peacock,* 654 F.2d 339, 348 (5th Cir. 1981), *modified,* 686 F.2d 356 (5th Cir. 1982), *cert. denied,* 464 U.S. 965 (1983); *of. Holzer,* 840 F.2d at 1350-52 (where only one predicate act was also a separate conviction, it "provide[d] one of the two struts that the government needs to supporft the racketeering conviction," but RICO conviction was vacated because jury could have rationally acquitted defendant of RICO in absence of mail fraud convictions). We have previously said that *Brown,* 583 F.2d 659, the only decision on the other side of the "conflict," is distinguishable from a case such as this one in that *Brown* involved "substantive offenses charged as predicate acts [that] were distinct and hence it was argujably impossible to determine from thne verdict which offenses the jury relied upo in finding the pattern of racketeering." *See Weisman,* 624 F.2d at 1124-25. Far from distinct, the Travel Act and wire fraud convictions in this case were so closely related that the jury's basing the RICO conviction only on the latter would have been irrational. As shown above, the Travel Act convictions and their close relationship to the wire fraud acts show that numerous non-wire fraud predicate acts were proved. Under such circumstance, nothing in the *Brown* decision would require invalidating the *RICO* conviction here, and therefore there appears to be no conflict among the circuits with respect to the situation involved in this case. *See Holzer,* 840 F.2d at 1351 (finding no conflict between the circuits based on prediction that a Third Circuit court would not use *Brown* to overturn a RICO conviction where jury would hae been "acting irrationally if it had acquitted the defendant of the racketeering charge even though two predicate offenses were properly proved").

We thus find that Brennan's Count One substantive RICO conviction remains valid after the vacatur of the

wire fraud convictions. Because Brennan's corresponding challenge to his RICO conspiracy conviction is built completely on the alleged invalidity of Count One, we similarly uphold his conviction under Count Two for violation of 18 U.S.C. § 1962(d).

2. The Statute of Limitations and the meaning of "Enterprise"

Brennan raises two other challenges to his RICO convictions which he did not raise in his direct appeal to this Court, one based on the statute of limitations and the other based on the statutory meaning, under RICO, of "enterprise." At trial, Brennan raised the latter argument, but not the former. Because Brennan failed to raise these issues earlier, we must first ask whether he is procedurally foreclosed from doing so now in this collateral proceeding. This question requires consideration of longstanding rules governing procedural foreclosures, along with the more recent development of the cause and prejudice test.

a. Procedural Foreclosure of Claims in § 2255 Proceedings

As a general rule, the failure to raise a nonconstitutional or nonjurisdictional claim on direct review has long precluded assertion of the claim in a collateral proceeding. See Stone v. Powell, 428 U.S. 465, 477 n.10 (1976); *Davis v. United States,* 417 U.S. 333, 345 n.15 (1974); *Kaufman v. united States,* 394 U.S. 217, 220 n.3 (1969); *Sunal v. Large,* 332 U.S. 174, 178-79 (1947); *pacelli v. united States,* 588 F.2d 360, 363 (2d Cir. 1978), *cert. denied,* 441 U.S. 908 (1979). Nevertheless, in "exceptional circumstances," even a nonconstitutional or nonjurisdictional error can result in a "complete miscarriage of

justice" justifying collateral relief. *Davis,* 417 U.S. at 346-47. In such circumstances, as, for example, where a subsequent change in the law has resulted in a petitioner's "conviction and punishment [having been imposed] for an act that the law does not make criminal," *id.,* we have refused to apply the general rule denying relief because of a procedural default. *See, e.g., Ingher,* 841 F.2d at 454; *United States v. Loschiavo,* 531 F.2d 659, 663-67 (2d Cir. 1976).

With respect to constitutional or jurisdictional claims, we have adhered to the rule that a section 2255 petitioner may raise such claims even though they were not raised on direct appeal, unless there is some showing of deliberate delay or bypass. *See Pacelli,* 588 F.2d at 363-65; *see also Grimes v. united States,* 607 F.2d 6, 10 (2d Cir. 1979).[1]

In *Wainwright v. Sykes,* 433 U.S. 72 (1977), the Supreme Court held that a state prisoner who had failed to comply at trial with the state's contemporaneous objection rule would have to satisfy the "cause and prejudice" test in order to obtain federal collateral review of the defaulted constitutional claim. While broadening the application of a test that had been articulated in *Davis v. United States,* 411 U.S. 233, 243-45 (1973),[2] and *Francis v. Henderson,* 425 U.S. 536 (1976), the Court nevertheless explicitly refused to adopt the cause and prejudice test as a universal standard for procedural defaults in all habeas corpus case, 433 U.S. at 88 n.12, and has continued to develop the applicability of the cause and prejudice test on a case-by-case basis. *See Smith v. Murray,* 477 U.S. 527 (1986); *Murray v. Carrier,* 477 U.S. 478 (1986); *Reed v. Ross,* 468 U.S. 1 (1984); *United States v. Frady,* 456 U.S. 152 (1982); *Engle v. Isaac,* 456 U.S. 107 (1982). Yet, as one commentator has recognized, these "[s]ubsequent decisions [have been]

written as if the standard of cause and prejudice governs virtually all questions of procedural default for state and federal prisoners." Meltzer, *State Court Forfeitures of Federal Rights,* 99 Harv. L. Rev. 1130, 1147 (1986).

Despite the different policy concerns regarding federal collatgeral review of federal as opposed to state proceedings, in *Frady* the Supreme Court made it clear that the cause and prejudice test has some applicability to section 2255 proceedings. *Frady,* 456 U.S. at 167. The Court held that a section 2255 petitioner's failure to object to jury instructions at trial constituted a procedural default that barred collateral review in the absence of a showing of cause and prejudice. In light of the applicability of the cause and prejudice test to issues not raised on direct appeal by state prisoners, *see Roman v. Abrams,* 822 F.2d 214, 222 (2d Cir. 1987), and in the wake of *Frady,* the question remains as to what extent, if any, the cause and prejudice test governs the reviewability of issues a federal prisoner has failed to raise on direct appeal. A number of courts have followed *Frady* and seen the cause and prejudice test as applicable to issues not raised on direct appeal, seemingly without regard to whether the issues were constitutionally or jurisdictionally based. *See United States v. Shelton,* 848 F.2d 1485, 1490 (10th Cir. 1988); *Lilly v. United States,* 792 F.2d 1541, 1544-46 (11th Cir. 1986) (implicity by majority and explicity by dissent); *United States v. Dunham,* 767 F.2d 1395, 1397 & n.2 (9th Cir. 1985). Others have continued to hold that non-constitutional or nonjurisdictional claims are generally not reviewable if not raised on direct appeal. *See Richards v. United States,* 837 F.2d 965, 966 (11th Cir. 1988) (per curiam); *United States v. Hanyard,* 762 F.2d 1226, 1230 n.1 (5th Cir. 1985); *Norris v. United States,* 687 F.2d 899, 900 (7th Cir. 1982).

Having reviewed the general rules govrning procedural foreclosure, we now consider the reviewability of Brennan's statute of limitations and enterprise agruments.

b. Procedural Foreclosure of Brennan's Statute of Limitations Claim

Brennan argues that his RICO and RICO conspiracy convictions are barred by the five year statute of limitations applicable to RICO prosecutions. *See* 18 U.S.C. % ;3282 (1982); *United States v. Walsh,* 700 F.2d 846, 851 (2d Cir.), *cert. denied,* 464 U.S. 825 (1983). Because the government filed the indictment in this case on July 26, 1985, it therefore had to show that a predicate act occurred after July 26, 1980 in order to convict Brennan of the substantive RICO count. *See Walsh,* 700 F.2d at 851; *united States v. Persico,* 832 F.2d 705, 714 (2d Cir. 1987), *cert. denied,* 108 S.Ct. 1995, 1996 (1988). With respect to the RICO conspiracy count, the government had to show that the "accomplishment or abandonment of the objectives of the conspiracy" occurred after July 26, 1980. *See Persico,* 832 F.2d at 713.

Brennan's statute of limitations argument parallels his argument based on *McNally.* He claims that the jury instructions permitted the jury to base the substantive RICO conviction on *Messina* and *Botta* predicate acts alone. Brennan maintains that because these acts occured more than five years before the filing of the indictment, the substantive RICO conviction is therefore invalid. With respect to the RICO conspiracy count, he urges us to adopt the dissenting view of Judge Newman in *Persico,* 832 F.2d at 721, and require of the government a showing of a conspiracy to commit a predicate act within the five year limitations period.

We need not consider the effect of Brennan's failure to raise this issue on direct appeal because this argument was procedurally forfeited at trial. Because Brennan was required to raise this issue at trial, and he did not, *see* 685 F.Supp. at 887, he is foreclosed from raising it on collateral review.[3]

Brennan's statute of limitations argument should have been raised as an affirmative defense at trial. *See Walsh,* 700 F.2d at 855-56; *see also United States v. Karlin,* 785 F.2d 90, 92-93 (3d Cir. 1986), *cert. denied,* 480 U.S. 907 (1987). Simply pleading not guilty did not put the statute of limitations in issue. *Walsh,* 700 F.2d at 856. More specifically, at trial, Brennan should have objected on statute of limitations grounds to the jury instruction of which he now complains. *See id.,* 700 F.2d at 855. Under Fed. R. Crim. P. 30:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

We have only recently noted this Rule's "important purpose of relieving the district court of the significant burden of having to guess which differences in language [in the jury instructions] are considered material by the partis." *United States v. Friedman,* 854 F.2d 535, 555 (2d Cir. 1988). In this way the Rule "'give[s] the trial court an adequate opportunity to correct any mistakes in the jury charge.'" *Id.* (quoting *United States v. Hamilton,* 684 F.2d 380, 385 (6th Cir.), *cert. denied,* 459 U.S. 976 (1982)). Had Brennan raised the statute of limitations argument before the jury retired, any alleged errors in the charge tht permitted a time-barred conviction could have been corrected.

Because Brennan failed to object to the jury instructions at trial, as required by Rule 30, the proper standard for procedural default in these circumstances is clearly established -- the cause and prejudice test. *Frady,* 456 U.S. at 168; *United States v. Dukes,* 727 F.2d 34, 43 (2d Cir. 1984). "Under this standard, to obtain collateral relief based on trial errors to which no contemporaneous objection was made, [Brennan] must show both (1) 'cause' excusing his double procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains." *Frady,* 456 U.S. at 167-68.

We need not consider the issue of "prejudice," because Brennan has failed to show any "cause" excusing his procedural default. *See Smith v. Murray,* 477 U.S. at 533. Brennan's only argument in this regard attempts to wrap his statute of limitations argument in the guise of a post-*McNally* development. He maintains that the statute of limitations argument "made at the time of trial would [have been] quite futile because *McNally* and [*United States v.] Carpenter*[, 108 S.Ct. 316 (1987),] were not decided." Br. of Appellant at 14. Actually, however, while it is possible that the question of the effect of *McNally* on Brennan's convictions may have directed his counsel's attention to the statute of limitations issue, a statute of limitations challenge to the jury chrge would have been no less valid at the time of trial. Brennan's complaint is that the jury charge permitted a RICO conviction based on predicate acts occurring more than five years before indictment. At the time of trial, the basis for such an objection was "far from unknown," *see Engle v. Isaac,* 456 U.S. at 131, s the applicable statute of limitations was clearly established, *see Walsh,* 700 F.2d at 851. The subsequent decisions in *McNally* and *Carpenter* are simply not relevant to this issue. Thus, whether the failure to raise the issue is explained by inadvertance or tactics, Brennan has

shown no cause to excuse his procedural default, *see Engle v. Isaac,* 456 U.S. at 133-34; *Murray v. Carrier,* 477 U.S. at 486-87, and his statute of limitations argument will not be reviewed here.

c. Procedural Foreclosure of Brennan's Argument Based on the Statutory Meaning of "Enterprise"

Relying on United States v. Ivic, 700 F.2d 51 (2d Cir. 1983), Brennan argues that the Supreme Court of New York cannot be considered an "enterprise" within the meaning of the RICO statute, 18 U.S.C. § 1961(4). He therefore argues that his RICO convictions are invalid.

Unlike his statute of limitations argument, this enterprise argument was raised by Brennan at trial. 629 F.Supp. at 295. Thus, our consideration of procedural foreclosure focuses on Brennan's failure to raise this issue in his direct appeal to this Court.

As noted *supra,* the traditional standard for the collateral review of nonconstitutional or nonjurisidictional claims has precluded review of such claims where they were not raised on direct review. We have on one occaion implied in *dicta* that, folowing *Frady,* the cause and prejudice test should now apply to nonconstitutional and nonjurisdictional arguments not raised on direct appeal. *See Fiumara v. United States,* 727 F.2d 209, 213-14 (2d Cir.) (applying *Frady* primarily to failure to raise nonconstitutional and nonjurisdictional objection at trial but also noting failure to raise issue on appeal), *cert. denied,* 466 U.S. 951 (1984). Nevertheless, in the absence of clear direction from the Supreme Court, we are reluctant to treat the cause and prejudice test as if it is "universally applied[,] . . .govern[ing] virtually all questions of procedural default for. . . .federal prisoners." Meltzer, *supra*

at 1147; *of. United States v. Corsentino,* 685 F.2d 48, 50-51 (2d Cir. 1982) (reading *Frady* narrowly so as not to apply to a challenge of a sentence alleged to have been imposed illegally). in the face of earlier Supreme Court precedent, *see, e.g., Stgone v. Powell,* 428 U.S. at 477 n.10, to hold that *Frady* requires that the cause and prejudice test apply to all nonconstitutional and nonjurisdictional arguments would seemingly constitute an expansion of the availability of collateral review. This would be an anomalous result because *Frady* and the Supreme Court's other cause and prejudice decisions were surely not intended to expand the availability of collateral review to those who have failed to raise claims at the first opportunity to do so. *See Frady,* 456 U.S. at 178 (Brennan, *J.*, dissenting) (criticizing the majority's "further step down this unfortunate path" of "progressive emasculation of collateral review of criminal convictions"); *see also Sanchez v. Miller,* 792 F.2d 694, 698 (7th Cir. 1986) ("underlying policy" of cause and prejudice test is to require prisoners to present claims first to "the forum initially available, primarily because of the costs associated with granting a writ of habeas corpus"), *cert. denied,* 479 U.S. 1056 (1987). We therefore choose to adhere to the traditional rule that nonconstitutional and nonujurisdictional claims are generally procedurally foreclosed to a section 2255 petitioner if not raised on direct appeal.[4]

We believe that Brennan's enterprise argument is neither constitutional nor jurisdictional in nature. Brennan's claim admount to the contention that he was convicted under an erroneous interpretation of a statutory term. As Judge Friendly said in *United States v. Travers:*

> [W]e must take *Sunal* as meaning that when the error is one ;which can be rectified by proper construction of a criminal statute without resort to the Constitu-

> tion, a claim that a conviction was had without proof of all the elements required by the statute is not a constitutional claim s that phrase is used in respect of collateral attack.

514 F.2d 1171, 1177 (2d Cir. 1974) (relying also on *Davis,* 417 U.S. at 345); *see also Sunal,* 332 U.S. at 182-83; *United Statges v. Angelos,* 763 F.2d 859, 861 (7th Cir. 1985) (assessing collateral reviewability of "issues of a nonconstitutional, nonjurisdictional character" where petitioner's claim was that the conduct for which he was convicted was not a crime).

Brennan's enterprise argument appears to be that he was convicted for "an act that the law does not make criminal." *See Davis,* 417 U.S. at 346. Such a characterization might suggest turning for guidance to cases where a change in the law subsequent to the petitioner's direct appeal creates "exceptional circumstances" making procedural foreclosure of a petitioner's nonconstitutional claim inappropriate. *See id.; see also Sunal,* 332 U.S. at 180 (quoting *Bowen v. Johnston,* 306 U.S. 19, 27 (1939)); *Loschiavo,* 531 F.2d at 663; *United States v. Coke,* 404 F.2d 836, 846-47 (2d Cir. 1968) (in banc). Recognizing the seriousness of such a situation, we have on occasion used "due process" language. *See Loschiavo,* 531 F.2d at 666; *cf. United States v. Liguori,* 438 F.2d 663, 669 (2d Cir. 1971) (assessing effect on conviction of subsequent constitutional decision). Nedvertheless, we believe that where such cases concern the interpretation of a statute, they can be collaterally reviewed under the discretionary exception to the general rule that nonconstitutional and nonjurisdictional claims are forfeited if not raised on direct appeal, and not because they are constitutional claims. Moreover, in making his enterprise argument, Brennan points to no change in the law subsequent

to his direct appeal. Thus, we reject any "endeavor. . . .to magnify [Brennan's enterprise argumental] to constitutional proportions." *See Sunal,* 332 U.S. at 182.[5]

We find no "excedptional circumstances" warranting review of B rennan's nonconstitutional and nonjurisdictional enterprise argument. The relevant law was well established at the time of his direct appeal, *see United States v. Bagaric,* 706 F.2d 42, 55-57 (2d Cir.), *cert. denied,* 464 U.S. 840 (1983); *Ivic,* 700 F.2d at 64-65; *United States v. Angelilli,* 660 F.2d 23, 30-35 (2d Cir. 1981), *cert. denied,* 455 U.S. 910, 945 (1982), and there has been no subsequent change of consequence. Therefore, we conclude that Brennan procedurally forfeited his enterprise argument when he railed to raise it on direct review.

B. The Travel Act and Extortion Convictions

Brennan also launches a broad attack on each of his fourteen Travel Act convictions and his one extortion conviction. Brennan's argument here seems to be based on a claim of prejudicial "spillover," *see Ivic,* 700 F.2d at 65, resulting from the inclusion in the trial of the wire fraud charge. We fail to see any such prejudice. We agree with the district court that "all of the evidence admitted in support of the wire fraud counts would have been admissible in support of the valid Travel Act counts." 685 F.Supp. at 887. Given this, Brennan's argument seems to be based on the claim that because the jury charge permitted the Travel Act and extortion convictions to be based on telephone calls, the jury therefore may have considered the "intangible rights" theory associated with the wire fraud charges in considering all of the crimes charged. The district court properly held that its jury instructions requiring the jury to consider each count separately, App. at 29, 32, adequately

protected against prejudicial spillover. *See, e.g., United States v. Teitler,* 802 F.2d 606, 617 (2d Cir. 1986).[6]

Because we find that the jury's consideration of the Travel Act and extortion charges was not tainted by the presence in his trial of the "intangilbe rights" theory we have recently, in a similar context, termed "hardly 'inflammatory,'" *see Friedman,* 854 F.2d at 582, we reject Brennan's challenge to these convictions.

CONCLUSION

We uphold the validity of Brennan's RICO and RICO conspiracy convictions because their validity is unaffected by the vacatur of his wire fraud convictions. Brennan's challenges to these two convictions based on the statute of limitations and the statutory meaning of "enterprise" have been procedurally forfeited and cannot be raised here. With respect to his Travel Act and extortion convictions, Brennan was in no way unfairly prejudiced by the presence in the trial of the wire fraud charges, and we refuse to disturb those convictions.

We affirm the judgment of the district court denying Brennan further relief.

FOOTNOTES

1. Because we find neither of Brennan's two arguments to be constitutional or jurisdictional, *see infra,* we have no occasion to examine whether the deliberate bypass test of *Fay v. Noia,* 372 U.S. 391 (1963), remains the proper standard for the procedural foreclosure of constitutional or jurisdictional issues not raised on direct appeal by federal prisoners. *See Norris v. United States,* 687

F.2d 899, 902-04 (7th Cir. 1983) (finding deliberate bypass test replaced by cause and prejudice test).

2. In light of the obvious risk of confusion, we note that this *Davis* case is unrelated to *Davis v. United States,* 417 U.S. 333 (1974), cited *supra* and *infra.*

3. Because we find Brennan's argument procedurally foreclosed, we do not examine another barrier that could preclude collateral relief, whether the claim would fall within the narrow realm of nonconstitutional or non-jurisdictional claims cognizable under section 2255. *See Wright v. United States,* 732 F.2d 1048, 1056-57 (2d Cir. 1984), *cert. denied,* 469 U.S. 1106 (1985); *Fiumara v. United States,* 727 F.2d 209, 213 (2d Cir.), *cert. denied,* 466 U.S. 951 (1984). The same comment applies to Brennan's enterprise argument, discussed *infra.*

4. We note that Brennan's enterprise argument would be considered forfeited even if the cause and prejudice test governed because he has not shown any cause for failing to raise this issue in his direct appeal.

APPENDIX B

PERTINENT STATUTES INVOLVED

28 U.S.C. 2255. Federal Custody; remedies on motion attacking sentence.

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United Statges, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

"A motion for such relief may be made at any time."

". . . .If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by the law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

18 U.S.C. 1951 Interference with commerce by threats or violence.

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be

transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the prupose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

18 U.S.C. 1951 Interference with commerce by threats or violence.

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attemps or conspires so do do, or commits or threatens physical violence to any person or property in furtherance or a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

"(b) As used in this section --"

"(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

18 U.S.C. 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to - . . . ."

"(b) As used in this section "unlawful activity" means. . . .(2) extortion, birbery. . . ."

18 U.S.C. 1961. Definitions.

"(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

18 U.S.C. 1962. Prohibited activities.

"(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

"(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section."

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA *INDICTMENT*

-against- Cr. No. 85-452 (JBW)
(Title 18, U.S.C. §§1962(c), 1962(d), 1963(a), 1952(a), 1343, 1951(a) and (2)

WILLIAM C. BRENNAN,

Defendant.

----------X

THE GRAND JURY CHARGES:

INTRODUCTION

-At all times material to this indictment:

1. The defendant WILLIAM C. BRENNAN was a Justice of the Supreme Court of the State of New York, sitting in Queens County and presiding over trials and other judicial proceedings involving felony criminal charges.

2. The defendant WILLIAM C. BRENNAN, as a Justice of the Supreme Court of the State of New York was a public official elected by the people of Queens County and sworn to serve the people of the State of New York according to the following oath of office:

"I, WILLIAM C. BRENNAN, .do solomnly swear that I will support the constitution of the United States and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of Justice of Supreme Court Eleventh Judicial District according to the best of my ability."

3. The Supreme Court of the State of New York, Queens County, which is located within the Eastern District of New York, constituted an "enterprise" within the meaning of Title 18, United States Code, Section 1961(4).

4. Section 200.10 of the New York Penal Law made it a crime punishable by imprisonment for more than one year for a public servant of the State of New York to solicit, accept or agree to accept money or any other benefit upon an agreement or understanding that his opinion,judgment, action, decision or exercise of discretion as a public servant would thereby be influenced.

COUNT ONE

1. On or about and between June 1973 and July 25, 1985, both dates being approximate and inclusive, within the Eastern Distict of New YHork and elsewhere, the defendant WILLIAM C. BRENNAN, being employed by the associated with the enterprise described above in paragraph 3 of the Introduction, the activities of which affected intrstate commerce, knowingly, wilfully and unlawfully did conduct and participate, directly and indirectly, in the conduct of the affairs of this enterprise through a pattern of racketeering activity within the meaning of Title 18, United States Code, Section 1961(5).

Bribe Receiving

2. It was a part of the pattern of racketeering activity that the defendant WILLIAM C. BRENNAN, directly and indirectly through persons known and unknown to the Grand Jury, did solicit, accept and agree to accept bribes in the form of money and other benefits from defendants and representatives of defendants in felony criminal cases then pending before him and other Justices of the Supreme Court of the State of New York Queens County, upon an agreement and understanding that his opinions, judgments, actions, decisions and exercises of discretion as a Justice of the Supreme Court of the State of Nedw York would thereby be influenced in the relevant criminal cases, in violation of Section 200.10 of the New York Penal Law.

Interstate Travel In Aid Of Racketerring

3. It was a further part of the pattern of racketeering activity that the defendant WILLIAM C. BRENNAN did travel and cause other persons known to the Grand Jury to travel in interstate commerce between the State of New York and the State of Florida, and did use and cause other prsons known to the Grand Jury to use telephone facilities in interstate commerce between the Stae of New York and the State of Florida, with the intent to promote, manage, establish, carry on and facilitate the promotion, mangement, establishment and carrying on of an unlawful activity, namely bribe receiving in violation of Section 200.10 of the New York Penal Law, and thereafter the defendant WILLIAM C. BRENNAN did and did attempt to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of this unlawful activity, and did cause other persons known and unknown to the Grand Jury to do and attempt to do

the same, all in violation of Title 18, United States Code, Section 1952(a).

Fraud By Wire

4. It was a further part of the pattern of racketeering activity that the defendant WILLIAM C. BRENNAN and other persons known and unknown to the Grand Jury, having devised and intending to devise a scheme and artifice to defraud the poeple of Queens County and the State of new York of their right to the honest and faithful services of the defendant WILLIAM C. BRENNAN in his official capacity as a Justice of the Supreme Court of the State of new York, did transmit and cause to be transmitted sounds by means of wire communication in interstate commerce, namely telephone calls between the State of New york and the State of Florida, for the purpose of executing such scheme and artifice to defraud, in violation of Title 18, United States Code, Section 1343.

Interference With Commerce By Extortion

5. It was a further part of the pattern of racketeering activity that the defendant WILLIAM C. BRENNAN did attempt to obstruct, delay and affect commerce by extortion in that the defendant WILLIAM C. BRENNAN did attempt to obtain and did cause another prson known to the Grand Jury to attempt to obtain money from another, with his consent, induced under color of official right, in violation of Title 18, United States Code, Section 1951(a).

Acts Of Racketeering Activity

6. This pattern of racketeering activity consisted of the following acts:

Racketeering Act One

A. On or about August 30, 1972, the Grand Jury of Queens County charged Lawrence Messina with the crimes of Promoting Gambling in the First Degree, Possession of Gambling Records in the First Degree and Conspiracy in the Second Degree in the case of *People of the State of New York v. Lawrence Messina,* Queens County Indictment No. 2338/72 (the "*Messina* case").

B. On or about October 25, 1974, the defendant WILLIAM C. BRENNAN granted Lawrence Messina's motion to dismiss the indictment in the *Messina* case.

C. On or about and between May 1974 and October 25, 1974, both dates being approximate and inclusive, within the Eastern District of New York, the defendant WILLIAM C. BRENNAN did commit the crime of Bribe Receiving in connection with the *Messina* case, in vilolation of Section 200.10 of the new York Penal Law.

Rackedteering Act Two

A. On or about November 18, 1971, the Grand Jury of Queens County charged Nicholas Botta with 25 counts of the crime of Promoting Gambling in the First Degree and one count of the crime of Possession of Gambling Records in the First Degree in the case of *People of the State of New York v. Nicholas Botta,* Queens County Indictment No. 3948/71 (the "*Botta* case").

B. On or about May 9, 1972, the defendant WILLIAM C. BRENNAN sentenced Nicholas Botta to a five year term of probation and imposed a $,100 fine in the *Botta* case.

C. On or about May 29, 1975, the defendant WILLIAM C. BRENNAN discharged Nicholas Botta from probation.

D. On or about and between May 1974 and May 29, 1975, both dates being approximate and inclusive, within the Eastern District of New York, the defendant WILLIAM C. BRENNAN did commit the crime of Bribe Receiving in connection with the *Botta* case, in violation of Section 200.10 of the New York Penal Law.

Racketeering Act Three

A. On or about February 21, 1980, the Grand Jury of Queens County charged John Romano with the crimes of Attempted Murder in the Second Degree, Asault in the First Degree and Criminal Possession of a Weapon in the Second Degree in the case of *People of the State of new York v. John Romano,* Queens County Indictment No. 2425/79 (the "*Romano* case").

B. On or about July 18, 1980, the defendant WILLIAM C. BRENNAN convicted John Romano of the crimes of Assault in the Second Degree and Criminal Possession of a Weapon in the Third Degree following a non-jury trial in the *Romano* case.

C. On or about January 12, 1981, the defendant WILLIAM C. BRENNAN granted John Romano's motion to set aside the guilty verdict in the *Romano* case and ordered a new trial.

D. On or about and between February 1980 and January 12, 1981, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant WILLIAM C. BRENNAN did commit the following crimes in connection with the *Romano* case:

(1) Bribe Receiving, in violation of Section 200.10 of the New York Penal Law.

(2) Interstate Travel in Aid of Racketeering, in violation of Title 18, United States Code, Section 1952(a).

Each of the following counts is realleged and incorporated by reference as though fully set forth herein:

(a) Count Three
(b) Count Four
(c) Count Five
(d) Count Six
(e) Count Seven
(f) Count Eight
(g) Count Nine
(h) Count Ten

(3) Fraud by Wire, in violation of Title 18, United States Code, Section 1343. Each of the following counts is realleged and incorporated by reference as though fully set forth herein:

(a) Count Eleven
(b) Count Twelve
(c) Count Thirteen
(d) Count Fourteen
(e) Count Fifteen
(f) Count Sixteen

Racketeering Act Four

A. On or about July 18, 1984, the Grand Jury of Queens County charged Salvatore Polisi with the crimes of Criminal Sale of a Controlled Substance in the First Degree and Criminal Possession of a Controlled Substance in the Second Degree in the case of *People of the State of New York v. Salvatore Polisi,* Queens County Indictment No. 3738/84 (the "*Polisi* case").

B. On or about and between January 31, 1985 and March 7, 1985, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant WILLIAM C. BRFENNAN did commit the following crimes in connection with the *Polisi* case:

(1) Bribe Receiving, in violation of Section 200.10 of the New York Penal Law.

(2) Interstate Travel in Aid of Racketeering, in violation of Title 18, United States Code, Section 1952(a). Each of the following counts is realleged and incorporated by reference as though fully set forth herein:

(a) Count Seventeen
(b) Count Eighteen
(c) Count Nineteen
(d) Count Twenty
(e) Count Twenty-One
(f) Count Twenty-Two

(3) Fraud by Wire, in violation of Title 18, United States Code, Section 1343. Each of the following counts is realleged and incorporated by reference as though fully set forth herein:

(a) Count Twenty-Three
(b) Count Twenty-Four
(c) Count Twenty-Five

(4) Interference with Commerce by Extortion, in violation of Title 18, United States Code, Section 1951(a). Count Twenty-Six is realleged and incorporated by reference as though fully set forth herein.

(Title 18, United States Code, Sections 1962(c) and 2).

COUNT TWO

1. The Introduction and Count One, above, are realleged and incorporated by reference as though fully set forth herein.

2. On or about and between June 1973 and inclusive, within the Eastern District of New York and elsewhere, the defendant WILLIAM C. BRENNAN, together with other persons known and unknown to the Grand Jury, being employed by and associated with the enterprise

described above in paragraph 3 of the Introduction, knowingly, wilfully and unlawfully did conspire to conduct and participate, directly and indirectly, in the conduct of the affairs of this enterprise through the pattern of racketerring activity described above in paragraphs 2 through 6 of Count One.

3. It was a part of this conspiracy that the defendant WILLIAM C. BRENNAN, together with other persons known and unknown to the Grand Jury, would take steps to conceal the existence of the conspiracy and to prevent detection of their crfminal activities.

(Title 18, United States Code, Section 1962(d)).

COUNTS THREE THROUGH TEN

1. On or about and between February 1980 and January 12, 1981, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant WILLIAM C. BRENNAN knowingly, wilfully and unlawfully did cause other persons known to the Grand Jury to travel in intrstate commerce and did use and cause other persons known to the Grand Jury to use a facility in interstate commerce, as set forth more fully in paragraph 5, below, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely bribe receiving in connection with the felony criminal case of *people of the State of New York v. John Romano,* Queens County Indictment Nos. 2425/79 and 2213/81 (the "*Romano* case"), in violation of Section 200.10 of the New York Penal Law, and thereafter the defendant WILLIAM C. BRENNAN did and did attempt to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of this unlawful activity of bribe receiv-

ing, and did cause other persons know and unknown to the Grand Jury to do and attempt to do the same.

2. It was a prt of this unlawful activity that the defendant WILLIAM C. BRENNAN agreed to accept and accepted a bribe in the form of a payment of money that was made on behalf of John Romano, the defendant in the *Romano* case, upon the agreement and understanding that in exchange for this bribe the defendant WILLIAM C. BRENNAN would take steps to set aside a prior verdict convicting John Romano of Assault in the Second Degree and Criminal Possession of a Weapon in the Third Degree and to grant him a new trial.

3. It was further a part of this unlawful activity that the defendant WILLIAM C. BRENNAN advised and instructed persons acting on behalf of John Romano as to what actions they would have to take, including the making of a motion for a new trial on the grounds of newly discovered evidence, to enable the defendant WILLIAM C. BRENNAN to, corupt the *Romano* case and to conceal the unlawful efforts toward that end.

4. It was further a part of this unlawful activity that, on or about January 12, 1981, the defendant WILLIAM C. BRENNAN set aside the prior verdict against John Romano and granted his motion for a new trial in the *Romano* case, on the grounds that new evidence had been discovered.

5. On or about the dates set forth below, the defendant WILLIAM C. BRENNAN cause other persons known to the Grand Jury to travel in interstate commerce and used and caused other persons known to the Grand Jury to use a facility in interstate commerce, namely the telephone, as described in each count listed below:

COUNT	*APPROX-IMATE DATE*	*TYPE OF ACTIVITY*	*FROM*	*TO*
THREE	11/28/80	Travel	Ft. Lauder-dale, Fla.	Queens, N.Y.
FOUR	12/7/80	Telephone Call	Hallandale, Fla.	Queens, N.Y.
FIVE	12/7/80	Telephone Call	Queens, N.Y.	Hallandale, Fla.
SIX	12/7/80	Telephone Call	Hallandale, Fla.	Floral Park, N.Y.
SEVEN	12/9/80	Telephone Call	Hallandale, Fla.	Queens, N.Y.
EIGHT	12/9/80	Telephone Call	Hallandale, Fla.	Floral Park, N.Y.
NINE	12/10/80	Telephone Call	Hallandale, Fla.	Queens, N.Y.
TEN	1/5/81	Travel	Ft. Lauder-dale, Fla.	Queens, N.Y.

(Title 18, United States Code, Sections 1952(a) and 2).

COUNTS ELEVEN THROUGH SIXTEEN

1. On or about and between February 1980 and January 12, 1981, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant WILLIAM C. BRENNAN, together with other persons known and unknown to the Grand Jury, knowingly, wilfully and unlawfully did devise and intend to devise a scheme and artifice to defraud the people of Queens County and the State of New York of their right to the honest and faithful services of the defendant WILLIAM C. BRENNAN in his official capacity as a public servant, namely a Justice of the Supreme Court of the State of New York, Queens County, presiding over the felony criminal case of *People of the State of New York v.*

John Romano, Queens County indictment Nos. 2425/79 and 2213/81 (the "*Romano* case").

2. It was a part of this scheme and artifice to defraud that the defendant WILLIAM C. BRENNAN agreed to accept and accepted a bribe in the form of a payment of money that was made on behalf of John Romano, the defendant in the *Romano* case, upon the agreement and understanding that in exchange for this bribe the defendant WILLIAM C. BRENNAN would take steps to set aside a prior verdict conviting John Romano of Assault in the Second Degree and Criminal Possession of a Weapon in the Third Degree and to grant him a new trial.

3. It was further a part of this scheme and artifice to defraud that the defendant WILLIAM C. BRENNAN advised and instructed persons acting on behalf of John Romaono as to what actions they would have to take, including the making of a motion for a new trial on the grounds of newly discovred evidence, to enable the defendant WILLIAM C. BRENNAN to corrupt the *Romano* case and to conceal the unlawful efforts toward that end.

4. It was further a part of this scheme and artifice to defraud that, on or about January 12, 1981, the defendant WILLIAM C. BRENNAN set aside the prior verdict against John Romano and granted his motionfor a new trial in the *Romano* case, on the grounds that new evidence had been discovered.

5. On or about the dates set forth below, within the Eastern District of New York and elsewhere, the defendant WILLIAM C. BRENNAN, for the purpose of execujting this scheme and artifice to defraud, did transmit and cause to be transmitted sounds by means of wire communication in interstate commerce, namely the telephone calls set forth in each count listed below:

COUNT	*APPROXIMATE DATE AND TIME*	*NUMBER AND LOCATION OF ORIGINATING CALL*	*NUMBER AND LOCATION OF RECEIVING CALL*
ELEVEN	12/7/80 1:28 p.m.	(305) 458-0621 Hallandale, Fla.	(212) 478-8184 Queens, N.Y.
TWELVE	12/7/80	Queens, N.Y.	(305) 458-0621 Hallandale, Fla.
THIRTEEN	12/7/80 4:05 p.m.	(305) 458-0621 Hallandale, Fla.	(516) 437-9476 Floral Park, N.Y.
FOURTEEN	12/9/80 9:30 a.m.	(305) 458-0621 Hallandale, Fla.	(212) 520-3501 Queens, N.Y.
FIFTEEN	12/9/80 10:09 a.m.	(305) 458-0621 Hallandale, Fla.	(516) 437-9476 Floral Park, N.Y.
SIXTEEN	12/10/80 12:04 p.m.	(305) 458-0621 Hallandale, Fla.	(212) 520-3501 Queens, N.Y.

(Title 18, United States Code, Sections 1343 and 2).

COUNTS SEVENTEEN THROUGH TWENTY-TWO

1. On or about and between January 31, 1985 and March 7, 1985, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant WILLIAM C. BRENNAN knowingly, wilfully and unlawfully did travel and cause other persons known to the Grand Jury to travel in interstate commerce and did use and cause other persons known to the Grand Jury to use a facility, in interstate commerce, as set forth more fully in paragraph 4, below, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely bribe receiving in connection with the felony criminal case of *People of the State of New York v. Salvatore Polisi,* Queens County Indictment No. 3738/84 (the "*Polisi* case"), in villation of Section 200.10 of the New York Penal Law, and thereafter the defendant WILLIAM C. BRENNAN did and did attempt to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of this unlawful activity of bribe receiving, and did cause other prsons known and unknown to the Grand Jury to do and attempt to do the same.

2. It was part of this unlawful activity that the defendant WILLIAM C. BRENNAN agreed to accept a bribe in the form of money that was to be paid by Salvatore Polisi, the defendant in the *Polisi* case, upon the agreement and understanding that in exchange for this bribe the defendant WILLIAM C. BRENNAN would take steps to have the charges then pending against Salvatore Polisi, namely Criminal Sale of a Controlled Substance in the First Degree and Criminal Possession of a controlled Substance in the Second Degree, dismissed.

3. In was further a part of this unlawful activity that the defendant WILLIAM C. BRENNAN took steps to

familiarize himself and other persons known andunknown to the Grand Jury with the facts and circumstances surrounding the *Polisi* case, in order to be able to corrupt the case and conceal the unlawful efforts toward that end.

4. On or about the dates set forth below, the defendant WILLIAM C. BRENNAN travelled and caused other persons known to the Grand Jury to travel in interstate commerce and used and caused other persons known to the Grand Jury to use a facility in interstate commerce, namely the telephone, as described in each count listed below:

COUNT	*APPROXIMATE DATE*	*TYPE OF ACTIVITY*	*FROM*	*TO*
Seventeen	2/1/85	Telephone Call	Queens, N.Y.	Hallandale, Fla.
Eighteen	2/2/85	Travel	Queens, N.Y.	Miami, Fla.
Nineteen	2/13/85	Travel	Queens, N.Y.	Ft.Lauderdale, Fla.
Twenty	2/17/85	Travel	Miami, Fla.	Queens, N.Y.
Twenty-One	2/20/85	Telephone Call	Queens, N.Y.	Hallandale, Fla.
Twenty-Two	2/22/85	Telephone Call	Queens, N.Y.	Hallandale, Fla.

(Title 18, United States Code, Sections 1952(a) and 2).

COUNTS TWENTY-THREE THROUGH TWENTY-FIVE

[1]. On or about and between January 31, 1985 and March 7, 1985, both dates being approximate and inclusive, within the Eatern District of New York and elsewhere, the defendant WILLIAM C. BRENNAN, together with other prsons known and unknown to the Grand Jury, knowingly, wilfully and unlawfully did devise and intend to devise a scheme and artifice to defraud the people of Queens County and the State of New York of their right to the honest and faithful services of the defendant WILLIAM C. BRENNAN in his official capacity as a public servant, namely a Justice of the Supreme Court of the State of New York, Queens County, in connection with the felony criminal case of *People of the State of New York v. Salvatore Polisi,* Queens County Indictment No. 3738/84 (the "*Polisi* case").

2. It was part of this scheme and artifice to defraud that the defendant WILLIAM C. BRENNAN cause representations to be made to Salvatore Polisi, the defendant in the *Polisi* case, that he, the defendant WILLIAM C. BRENNAN, would take steps to have the charges then pending against Salvatore Polisi, namely Criminal Sale of a Controlled Substance in the First Degree and Criminal Possession of a Controlled Substance in the Second Degree, dismissed in exchange for a bribe.

3. It was further a part of this scheme and artifice to defraud tht the defendant WILLIAM C. BRENNAN agreed to accept a bribe in the form of money that was to be paid by Salvatore Polisi upon the agreement and understanding that in exchange for this bribe the defendant WILLIAM C. BRENNAN would take steps to have the chages then pending against Salvatore Polisi, namely Criminal Sale of a Controlled Substance in the First Degree and Criminal Possession of a Controlled

Substance in the Second Degree, dismissed.

4. It was further a part of this scheme and artifice to defraud that the defendant WILLIAM C. BRENNAN took steps to familiarize himself and other persons known and unknown to the Grand Jury with the facts and circumstances surrounding the *Polisi* case, in order to be able to corrupt the case and conceal the unlawful efforts toward that end.

5. On or about the dates set forth below, within the Eastern District of New York and elsewhere, the defendant WILLIAM C. BRENNAN, for the purpose of executing this scheme and artifice to defraud, did transmit and cause to be transmitted sounds by means of wire communication in interstate commerce, namely the telephone calls set forth in each count listed below:

Count	*Approximate Date and Time*	*Number and Location of Originating Call*	*Number and Location of Originating Call*
Twenty-Three	2/1/85	Queens, N.Y.	(305) 458-0621 Hallandale, Fla.
Twenty-Four	2/20/85 3:54 p.m.	(718) 520-3070 Queens, N.Y.	(305) 458-0621 Hallandale, Fla.
Twenty-Five	2/22/85 3:52 p.m.	(718) 520-3174 Queens, N.Y.	(305) 458-0621 Hallandale, Fla.

(Title 18, United States Code, Sections 1343 and 2).

COUNT TWENTY-SIX

On or about and between January 31, 1985 and March 7, 1985, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant WILLIAM C. BRENNAN knowingly, wilfully and unlawfully did attempt to obstruct, delay and affect commerce by extortion in connection with the felony criminal case of *People of the State of New York v. Salvatore Polisi,* Queens County Indictment No. 3738/84 (the "*Polisi* case"), in that the defendant WILLIAM C. BRENNAN did attempt to obtain and did cause another prson know to the Grand Jury to attempt to obtain approximately $25,000 from Salvatore Polisi, with his consent, induced under color of official right.

(Title 18, United States Code, Sections 1951(a) and 2).

A TRUE BILL

FOREPERSON

RAYMOND J. DEARIE
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

shall be guilty of an offense against the United States. The statute goes on to define "unlawful activity" to include "bribery. . . .in violation of the laws of the State in which committed."

In order to prove the defendant guilty of a Travel Act violation, the Government must prove three elements beyond a reasonable doubt:

First, that at or about the time charged in the indictment, the interstate travel or use of the telephone for an interstate call occurred as specified in the indictment;

Second, that the interstate travel or telephone call was conducted with the specific intent to further the unlawful activity charged in the indictment, namely bribery;

Third, that, following the interstate travel or telephone call, the defendant knowingly and wilfully forthered or attempted to further the unlawful activity of bribery in some manner.

Before explaining these elements to you, I instruct you that in general the law does not require that the defendant personally perform every act constituting the offense charged. The law recongnizes that a person who knowingly and wilfully aids, abets, induces or causes another person to commit an offense is just as guilty of that offense as if he committed it himself. The law also recognizes that a person who acts as a co-conspirator with another person or persons in furtherance of a common criminal purpose is, while he is a member of the conspiracy, criminally liable for all of the acts by his co-conspirators that further the conspiracy, even if the acts were committed in his

absence and without his knowledge. These principles apply to every offense that is alleged in the indictment. I will later instruct you further concerning these concepts of aiding and abetting and conspiracy.

The first element of a travel Act violation that the Government must establish is the interstte travel or use of the telephone for an interstate call as alleged in the indictment. By interstate travel or telephone call, I mean travel or a telephone call from one state to another--in this case, from Nw York to Florida or vice-versa.

It is not necessary for the Govrnment to prove that the defendant himself travelled or participated in the telephone call in question. Nor is it necessary to show that the defendant specifically authorized another prson to do one of these acts or that the defendant was even aware that the act was taking place. It is sufficient if the evidence shows that the defendant aided, abetted, induced or caused another pron's interstate travel or telephone call, or that the travel or call was conducted by another person acting as a co-conspirator or aider or abettor.

A "pattern of racketeering activity" requires at least two acts of racketeering activity, as I have just defined them, committed within ten years of each other. Remember, however, that the indictment groups the charges I have just listed under four racketeering or predicate acts, corresponding to four criminal cases in Queens tht the defendant allegedly corrupted. Thus, the indictment charges (1) Bribe Receiving in connection with the *Messina* case; (2) Bribe Receiving in connection with the *Botta* case; (3) Bribe Receiving, eight counts of Interstate Travel in Aid of Racketeering, and six counts of Wire Fraud in connection with the *Romano* case; and (4) Bribe Receiving, six counts of Intrstate Travel in Aid of

Racketeering, three counts of Wire Fraud and one count of Interference with Commerce by Attempted Extortion in connection with the *Polisi* case.

In this case, therefore, in order to establish a pattern of racketeering activity the Government must prove beyond a reasonable doubt that the defendant committed *at least one* of the offenses charged under any two of the predicate acts alleged. This means that you need only find the defendant quilty of one count under the third or fourth predicate acts, which charge multiple violations, for that predicate to form part of the necessary pattern. For example, if you find tht the defendant committed Bribe Receiving in connection with the *Romano* case and Bribe Receiving in connection with the *Polisi* case, then, subject to other requirements on which I will instruct shortly, the Government has proved a pattern of racketeering activity. Similarly, if you find the defendant quilty of Bribe Reveiving in connection with the *Messina* case and guilty of one count of Wire Fraud in connection with the *Romano* case, then, subject to what I will tell you shortly, the Govrnment has proved the necessary pattern. You need only find, in other words, that the defendant committed two of the crimes that constitute racketeering activity. However, you must find that the defendant committed these crimes under at least two separate predicate acts. For example, if you find the defendant guilty of one count of Bribe Receiving and one count of Interstate Travel in Aid of Raketeering in connection with the *Polisi* case only, and acquit the defendant of all other charges, then the Government has not proved a pattern.

Of course, you must make a determination of the defendant's guilt or innocence on each of the federal charges contained in the indictment, since each is also an independent count against the defendant.

The Government must also prove beyond a reasonable doubt other facts in order to establish the necessary pattern. As I have already instructed you, the two necessary predicate acts must occur within ten years of each other. The Government mut also prove that the predicate acts constituted part of a pattern of activity. That is to say, the predicte acts committed by the *defendant must have been connected to each other by some common element, such as the same or similar purposes.*